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Simcity-ETE Venture Sdn Bhd v Koperasi Pembangunan Kampung Tradisional Tasek Pulau Pinang Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-1900–10 OF 2019
KAMALUDIN MD SAID, CHE MOHD RUZIMA AND AHMAD ZAIDI IBRAHIM JJCA
29 OCTOBER 2021

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Civil Procedure — Appeal — Appeal against decision of High Court — High Court allowed respondent's claim and dismissed appellant's counterclaim — Respondent claimed for unjust enrichment — Appellant counterclaimed for removal of private caveat lodged by respondent and claimed for damages — Whether there was any unjust enrichment received by appellant — Whether appellant's counterclaim for removal of private caveats filed by plaintiff over land together with order for assessment of damages to be allowed

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This was an appeal by the appellant ('D3') against part of the decision of the High Court which allowed the respondent's ('plaintiff') claim for unjust enrichment and dismissed D3's counterclaim for the removal of the private caveat lodged by the plaintiff and for the dismissal of the claim for damages thereof. The plaintiff was the registered owner of a land ('the land'). In late

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1995, pursuant to an agreement, the plaintiff appointed Multi Track Properties Sdn Bhd ('MTP'), a developer to develop a housing project ('the project') on the land. However, MTP failed to complete the project and the project was left suspended. The plaintiff thereafter appointed a new developer, Elite Domain Sdn Bhd ('EDSB') to revive and complete the project. EDSB also failed to do

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so and the project was again left suspended. D1 approached the plaintiff and offered to take over and to complete the project. As a result, a joint venture was established comprising of the plaintiff, D1 and D2 culminating in the execution of an agreement known as the property management agreement ('PMA') entered between the plaintiff and D3 which was jointly owned by the

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D1 and D2. However, D3 failed to commence works as there were charges on the land that needed to be cleared before the project could be revived. Upon negotiations with the financiers, the redemption sum in respect of the charges were reduced from RM18m to RM800,000. The plaintiff had difficulty to raise the fund and requested D3 pay the redemption sum on their behalf. To

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settle the matter, the plaintiff and D3 agreed to sign an additional agreement ('AA'). Pursuant to the AA, the plaintiff transferred all the development lots ('the 128 lots') on part of the land to D3. As part of the promise, D3 should pay RM100,000 to the plaintiff upon transfer of the 128 lots to D3 and to pay the balance upon completion of the project. D3 failed to complete the whole of the

project at any time. Upon request, various extensions of time were given by the plaintiff to D3. After nine years, the 442 units of buildings were completed. However, the 532 units of buildings referred to in Item D of the First Schedule to the PMA that were yet to be sold and built were never commenced at all by D3. Alleging that D3 failed to honour its promise under the PMA and the AA, the plaintiff decided to claim back the 128 lots and had entered a private caveat on the 128 lots. D3 resisted the plaintiff's claim on the basis that the plaintiff had accepted D3 performance of the contract and that the 128 lots had been transferred to D3 as consideration and not security. In the counterclaim, D3 sought to set aside the private caveats lodged by the plaintiff on the 128 lots and to seek damages for the loss suffered consequents to the lodging of the caveats. The High Court allowed the plaintiff's claim and dismissed D3's counterclaim. Hence, this appeal.

Held, allowing the appeal in part:

(1) The basis of the plaintiff's claim against D3 was for the return of the 128 lots which had been transferred to D3. Nowhere, especially in the statement of claim did the plaintiff plead restitution for unjust enrichment or at least laid down material facts or material particulars that gave rise to unjust enrichment. The plaintiff also did not plead that its cause of action was founded on the law of unjust enrichment. Therefore, it was crystal clear that the issue of unjust enrichment or unjust benefit was never pleaded by the plaintiff. The learned High Court judge ('HCJ') had erred in his finding when he found out that the plaintiff had framed its case on restitution for unjust enrichment based on plaintiff's pleadings. Next, it would be wholly unjustifiable for the learned HCJ to decide that a claim for unjust enrichment could be based on inadequate consideration received by the plaintiff compared to the benefits obtained by D3 under the PMA and the AA. Clearly, the learned HCJ had erred in his finding on this matter (see paras 40–41 & 45).

(2) D3 had received the 128 lots under a valid contractual transaction and therefore, no element of unjust enrichment could arise from that transaction. Next, the plaintiff was not entitled to complain about D3's delay in completion of the project. Furthermore, the plaintiff did not claim for breach of contract on the basis that D3 did not complete the construction of the 128 lots or delayed the construction of the project within the time frame. With the modification to cl 2 and 5(a) of the PMA as agreed by the plaintiff, D3 was no longer under obligation to complete the project in entirety. Therefore, it was wrong for the learned HCJ to make a finding and hold that there was unjust on the part of the D3's to retain the 128 lots on the reason that D3 failed to complete the project in entirety. Based on the finding that D3 was no longer under obligation to complete the project in entirety, D3 had in fact completed its obligation under the contracts. Therefore, the learned HCJ had erred in his finding

A that the contracts had been mutually terminated by conduct of the parties and the principle of loss lied where it fell applied (see paras 49–50, 55 & 57–58).

(3) After the 128 lots being legally transferred to D3, the plaintiff had no B longer registrable interest on those lands. Even if the learned HCJ was correct in his decision on the issue on unjust enrichment, the plaintiff's right was only confined to the monetary interest or a right in personam against D3 and that right did not create any caveatable interest on the 128 lots. Therefore, those caveats entered by the plaintiff should be C removed in limine. There was no single evidence presented by D3 to prove that it suffered losses due to the entry of the plaintiff's caveats. Therefore, D3 failed to prove any loss as a result of the wrongful entry of plaintiff's caveats on the 128 lots. Consequentially, the court could not accede to D3's application to have an order for the damages to be assessed D by the High Court (see paras 62 & 64–65).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('D3') terhadap sebahagian daripada keputusan Mahkamah Tinggi yang membenarkan tuntutan responden ('plaintif') untuk E pengayaan yang tidak adil dan menolak tuntutan balas D3 untuk pembatalan kaveat persendirian yang dimasukkan oleh plaintif dan kerana menolak tuntutan untuk ganti ruginya. Plaintif adalah pemilik berdaftar satu tanah ('tanah'). Pada akhir 1995, menurut satu perjanjian, plaintif melantik Multi Track Properties Sdn Bhd ('MTP'), satu pemaju untuk membangunkan projek F perumahan ('projek') di atas tanah tersebut. Bagaimanapun, MTP gagal menyiapkan projek itu dan projek itu dibiarkan tergantung. Plaintif selepas itu melantik pemaju baharu, Elite Domain Sdn Bhd ('EDSB') untuk memulihkan dan menyiapkan projek itu. EDSB juga gagal berbuat demikian dan projek itu sekali lagi tergantung. D1 mendekati plaintif dan menawarkan untuk G mengambil alih dan menyiapkan projek tersebut. Hasilnya, satu usaha sama telah ditubuhkan yang terdiri daripada plaintif, D1 dan D2 yang memuncak dengan pelaksanaan perjanjian yang dikenali sebagai perjanjian pengurusan harta ('PMA') yang dimeterai antara plaintif dan D3 yang dimiliki bersama oleh D1 dan D2. Bagaimanapun, D3 gagal untuk memulakan kerja kerana H terdapat cagaran ke atas tanah yang perlu diselesaikan sebelum projek itu boleh dihidupkan semula. Selepas rundingan dengan pembiaya, jumlah tebus hutang bagi cagaran telah dikurangkan daripada RM18juta kepada RM800,000. Plaintif mengalami kesukaran untuk mengumpul dana dan meminta D3 membayar jumlah penebusan bagi pihak mereka. Untuk I menyelesaikan perkara itu, plaintif dan D3 bersetuju menandatangani perjanjian tambahan ('AA'). Menurut AA, plaintif memindahkan semua lot pembangunan ('128 lot') di sebahagian tanah kepada D3. Sebagai sebahagian daripada janji itu, D3 perlu membayar RM100,000 kepada plaintif selepas pemindahan 128 lot kepada D3 dan membayar baki selepas projek siap. D3

gagal menyiapkan keseluruhan projek pada bila-bila masa. Atas permintaan, pelbagai lanjutan masa telah diberikan oleh plaintif kepada D3. Selepas sembilan tahun, 442 unit bangunan telah siap. Bagaimanapun, 532 unit bangunan yang disebut dalam Item D Jadual Pertama PMA yang masih belum dijual dan dibina tidak pernah dimulakan sama sekali oleh D3. Mendakwa D3 gagal menunaikan janjinya di bawah PMA dan AA, plaintif memutuskan untuk menuntut semula 128 lot tersebut dan telah memasukkan kaveat persendirian pada 128 lot tersebut. D3 menentang tuntutan plaintif atas dasar bahawa plaintif telah menerima pelaksanaan kontrak D3 dan bahawa 128 lot telah dipindahkan ke D3 sebagai balasan dan bukan jaminan. Dalam tuntutan balas, D3 berusaha untuk mengetepikan kaveat persendirian yang dikemukakan oleh plaintif ke atas 128 lot dan untuk menuntut ganti rugi bagi kerugian yang dialami akibat daripada kemasukan kaveat tersebut. Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas D3. Oleh itu, rayuan ini.

Diputuskan, membenarkan sebahagian rayuan:

(1) Asas tuntutan plaintif terhadap D3 adalah untuk pemulangan 128 lot yang telah dipindahkan ke D3. Tiada, terutamanya dalam pernyataan tuntutan, plaintif memplid restitusi untuk pengayaan yang tidak adil atau sekurang-kurangnya meletakkan fakta material atau butiran material yang menimbulkan pengayaan yang tidak adil. Plaintif juga tidak memplid bahawa kausa tindakannya adalah berdasarkan undang-undang pengayaan yang tidak adil. Oleh itu, adalah jelas bahawa isu pengayaan yang tidak adil atau faedah yang tidak adil tidak pernah diplid oleh plaintif. Hakim Mahkamah Tinggi ('HMT') yang bijaksana telah terkhilaf dalam penemuannya apabila beliau menemukan bahawa plaintif telah merangka kesnya mengenai restitusi untuk pengayaan yang tidak adil berdasarkan pliding plaintif. Seterusnya, adalah tidak wajar bagi HMT yang bijaksana untuk memutuskan bahawa tuntutan untuk pengayaan yang tidak adil boleh berdasarkan pertimbangan yang tidak mencukupi yang diterima oleh plaintif berbanding faedah yang diperolehi oleh D3 di bawah PMA dan AA. Jelas sekali, HMT yang bijaksana telah terkhilaf dalam penemuannya mengenai perkara ini (lihat perenggan 40–41 & 45).

(2) D3 telah menerima 128 lot di bawah transaksi kontrak yang sah dan oleh itu, tiada unsur pengayaan yang tidak adil boleh timbul daripada transaksi tersebut. Seterusnya, plaintif tidak berhak untuk mengadu tentang kelewatan D3 dalam menyiapkan projek. Tambahan pula, plaintif tidak menuntut pelanggaran kontrak atas dasar D3 tidak menyiapkan pembinaan 128 lot tersebut atau menangguhkan pembinaan projek dalam jangka masa. Dengan pengubahsuaian kepada klausa 2 dan 5(a) PMA seperti yang dipersetujui oleh plaintif, D3 tidak lagi bertanggungjawab untuk menyiapkan projek tersebut secara

keseluruhan. Oleh itu, adalah salah bagi HMT yang bijaksana untuk membuat penemuan dan memutuskan bahawa terdapat ketidakadilan di pihak D3 untuk mengekalkan 128 lot itu atas sebab D3 gagal menyiapkan projek itu sepenuhnya. Berdasarkan dapatan bahawa D3 tidak lagi bertanggungjawab untuk menyiapkan projek secara keseluruhan, D3 sebenarnya telah menyelesaikan tanggungjawabnya di bawah kontrak. Oleh itu, HMT yang bijaksana telah terkhilaf dalam penemuannya bahawa kontrak telah ditamatkan secara bersama melalui kelakuan pihak-pihak dan prinsip kerugian terletak di mana ia terpakai (lihat perenggan 49–50, 55 & 57–58).

(3) Selepas 128 lot dipindahkan secara sah kepada D3, plaintif tidak lagi mempunyai kepentingan boleh didaftarkan ke atas tanah tersebut. Walaupun jika HMT yang bijaksana betul dalam keputusannya mengenai isu pengayaan yang tidak adil, hak plaintif hanya terhad kepada kepentingan kewangan atau hak in personam terhadap D3 dan hak itu tidak mewujudkan sebarang kepentingan kaveat ke atas 128 lot tersebut. Oleh itu, kaveat yang dimasukkan oleh plaintif hendaklah dibatalkan in limine. Tiada keterangan yang dikemukakan oleh D3 untuk membuktikan bahawa ia mengalami kerugian akibat kemasukan kaveat plaintif. Oleh itu, D3 gagal membuktikan sebarang kerugian akibat kemasukan kaveat plaintif yang salah pada 128 lot tersebut. Akibatnya, mahkamah tidak dapat menerima permohonan D3 untuk mendapatkan perintah supaya ganti rugi dinilai oleh Mahkamah Tinggi (lihat perenggan 62 & 64–65).]

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)
Bolton v Madden (1873) LR 9 QB 55, QBD (refd)
Chappell & Co Ltd v Nestle Co Ltd [1959] UKHL 1, HL (refd)
Currie v Misa [1875] LR 10 Ex 153 (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Fairfield Sentry Ltd (in Liquidation) v Migani and others and other cases [2014] UKPC 9, PC (refd)
Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal [2006] MLJU 649; [2007] 3 CLJ 413, CA (refd)
Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)
Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd [2014] 2 MLJ 322, CA (refd)
PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60; [2021] 2 CLJ 441, FC (refd)
Score Options Sdn Bhd v Mexaland Development Sdn Bhd [2012] 6 MLJ 475, FC (refd)
Tan Tay Vui v MC Global Sdn Bhd [2020] MLJU 712; [2020] 1 LNS 21, CA (refd)

Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals [2018] 3 MLJ 141, FC (folld)

Legislation referred to

Contracts Act 1950 s 26
Co-operative Societies Act 1993
Courts of Judicature Act 1964 s 64(4), (5)
Rules of Court 2012 O 15 r 2(2)
Rules of the Court of Appeal 1994 r 7(4), (5)

Appeal from: Civil Suit No PA-22NCVC-69–03 of 2017 (High Court, Pulau Pinang)

Karin Lim Ai Ching (Ung Chirt Kye, Dominic Pillai s/o RK Pillai and Ooi Zie Yiong with her) (Phee, Chen & Ung) for the appellant.
Nicholas Tan Soon Teik (Lee Fei Wen, Phoebe Ooi Mei Wei and Chai Shi Hong with him) (Lim Huck Aik & Co) for the respondent.

Che Mohd Ruzima JCA:

INTRODUCTION

[1] This is an appeal by Simcity-ETE Venture Sdn Bhd (the appellant/third defendant) against part of the decision of the Penang High Court dated 20 September 2019 which allowed Koperasi Pembangunan Kampung Tradisional Tasek Pulau Pinang Bhd (the respondent/plaintiff) claim for unjust enrichment and dismiss the appellant/third defendant counterclaim for the removal of the private caveat lodge by the respondent/plaintiff and for the dismissal of the claim for damages thereof.

[2] For easy reference, parties in this appeal will be referred to as in the trial court, the plaintiff and the third defendant (D3). The other defendants wili be referred to as D1, D2, D4, D5 and D6 when necessary.

BACKGROUND FACTS

[3] The plaintiff, a cooperative society registered pursuant to the Co-operative Societies Act 1993 is the registered owner of Lot 4232 PT24 (formerly known as Lot 1054 and Lot 1331), Mukim 15, Tasek, Daerah Seberang Perai Selatan, Pulau Pinang ('the said land').

[4] In late 1995, pursuant to an agreement dated 1 December 1995, the plaintiff appointed Multi Track Properties Sdn Bhd ('MTP'), a developer to develop a housing project known as Taman Pekatra Indah ('project') on the said

land. Based on the agreement, MTP was obliged to complete the said project by 1 December 1999. However, MTP failed to do so and the said project was left suspended.

[5] The plaintiff thereafter appointed a new developer, Elite Domain Sdn Bhd ('EDSB') to revive and complete the said project. EDSB also failed to do so and the project was again left suspended.

[6] Then, D1 approached the plaintiff and offered to take over and to complete the said project. As a result, a joint venture was established comprising of the plaintiff, D1 and D2 culminating in the execution of an agreement known as the property management agreement ('PMA') dated 12 July 2007 entered between the plaintiff and D3 which is jointly owned by the D1 and D2. In gist, the plaintiff had appointed D3 as its property manager, stepped in as a 'white knight' to revive the said project which had been abandoned for about 12 years.

[7] However, D3 failed to commence works as there were charges on the said land that needed to be cleared before the said project could be revived. Upon negotiations with the financiers, the redemption sum in respect of the charges were reduced from RM18m to RM800,000. The plaintiff had difficulty to raise the fund and requested D3 pay the redemption sum on their behalf.

[8] To settle the matter, the plaintiff and D3 agreed to sign an additional agreement ('AA') dated 29 October 2008. Briefly, they had agreed that:

(a) D3 to bear and pay the sum of RM800,000 on behalf of the plaintiff to discharge the charge over the said land so that the abandoned project can be revived,

(b) D3 to pay the plaintiff additional consideration of RM500,000; and

(c) as a consideration and security of D3 making payments as set out in recital of the AA, the plaintiff agreed to transfer to D3 all the development lots consist of 126 units of shophouses, one lot of business complex and one lot of the medium cost apartments in the said project. Altogether 128 lots ('the 128 lots').

[9] Pursuant to the AA, the plaintiff on 1 February 2009 transferred the 128 lots on part of the said land to D3. As part of the promise, D3 should pay RM100,000 to the plaintiff upon transfer of the 128 lots to D3 and to pay the balance upon completion of the said project. However, D3 alleged that it only received the sum of RM65,000 under the AA and later a further RM1,000 under the PMT from the plaintiff.

[10] D3 failed to complete the whole of the said Project at any time. Upon request, various extensions of time were given by the plaintiff to D3. After nine years, the 442 units of buildings in the renamed phases 1 to 5 were completed with the certificate of fitness for occupation issued by the local authority between 2009 and 2016. However, the 532 units of buildings referred to in Item D of the First Schedule to the PMA that were yet to be sold and built were never commenced at all by D3. Alleging that D3 failed to honour its promise under the PMT and the AA, the plaintiff decided to claim back the 128 lots and had entered a private caveat on the 128 lots.

[11] Initially the plaintiff commenced Suit No PA-22NCVC-69–03 of 2017 ('Suit 69') and D3 commenced six originating summons which were on 15 March 2017 converted to a writ action and merged into Suit No PA-22NCVC-71–03 of 2017 ('Suit 71'). The parties thereafter merged their claims and defences in Suit 71 into Suit 69 with the addition of counterclaim filed by D3.

[12] The plaintiff principally claimed for recovery of the 128 lots that was transferred to the D3 pursuant to the PMA and the AA. The plaintiff's grounded its claimed based on the reason that the 128 lots were transferred to D3 as security for the performance of the agreements between them. D3 resisted the plaintiff's claim on the basis that the plaintiff had accepted D3 performance of the contract and that the 128 lots had been transferred to D3 as consideration and not security. In the counterclaim, D3 seek to set aside the private caveats lodge by the plaintiff on the 128 lots and to seek damages for the loss suffered consequents to the lodging of the said caveats.

[13] The trial of both Suit 69 and Suit 71 took six days in two tranches, to wit, on 7–9 August 2018 for the first tranche and 14–15 March 2019 as well as 25 April 2019 for the second tranche. This was done because, after the conclusion of the first tranche of the trial, the learned High Court judge ('HCJ') concerned that there was no evidence led by the parties on unjust enrichment if part of the land as sought is ordered to be returned to the plaintiff or retained by D3. Hence, on 9 November 2018, the trial was by consent ordered to be re-opened and the second tranche of the trial dealt only with this aspect of unjust enrichment.

DECISION OF THE HCJ

[14] Briefly, the learned HCJ had decided on three main issues that arose from the trial. The three main issues are:

(a) who are the proper parties to the PMA and the AA;

(b) what is the purpose of the transfer of the 128 lots by the plaintiff to D3 pursuant to the AA; and

(c) what is the consequence of the transfer of the 128 lots as a result of the mutual termination of the PMA and the AA before their entire completion?

[15] On the first issue, the learned HCJ concluded that the proper parties to the contract are the plaintiff and D3.

[16] For the second issue, the learned HCJ found and held that upon reading of both recital G and cl 2.4 of the AA read together with the PMA, it is plainly expressed that the 128 lots were transferred by the plaintiff to D3 as consideration. It is also expressed as for security not for the plaintiff, but for D3 in consideration of redeeming the reduce amount of RM800,000 loan then owing by MTP to the bridging financier as well as to pay the plaintiff the consideration sum of RM500,000. In other words, the 128 lots were not transferred as security to D3 to ensure that the D3 completed the said project in its entirety as envisaged in the PMT and the AA, as asserted by the plaintiff. The learned HCJ further found and held that on an objective construction of the AA, the arrears in quit rent in respect of the 128 lots must be borne by D3 as the new registered proprietor, not the plaintiff.

[17] As to the third issue, the learned HCJ found and held that based on the conduct of the parties, the agreement between the plaintiff and D3 had been mutually terminated and that the loss lies where it falls. As to D3's claimed that it had incurred about RM18,225,571.16 to execute the reduced scope of the PMA and AA, it has been challenged by the plaintiff as being excessive and mixed up with expenditures unconnected with the said project. D3 in undertaking the said project had also benefitted from the balance purchase price payment of the sold units amounted to RM8,898,806.08. The present value of the 128 lots is RM16,420,000. They add up to RM25,318,806.08. Mathematically as it stands, D3 hence stood to gain a profit of about 28% without completing its originally undertaken obligation under the PMA and AA. D3 had aiso not paid the balance of RM435,000 to the plaintiff as envisaged in the AA. Furthermore, the value of the undeveloped lots had probably appreciated during the prolonged period of completion of the renamed phases 1 to 5 of the said project.

[18] In the circumstances, the learned HCJ further found and held that D3 had unjustly benefited at the expense of the plaintiff by simply retaining the 128 lots undeveloped. Having done so, D3 has profited at least in the sum of RM7,093,234.90 without having to assume the contractual risk of developing the said project in entirety. Moreover, D3 is likely to gain from the sheer appreciation in value of the 128 lots over the period of time of the prolonged

completion of the other completed parts of the said project. The 128 lots may instead be now put for sale as empty land by the D3 without any commercial risks at the plaintiff experience. As such, the enrichment on the part of D3's retention of the 128 lots is without basis and unjust unless appropriately restituted.

[19] Notwithstanding the 128 lots had been lawfully transferred to D3 as consideration, the learned HCJ finally found and held that D3 may retain the 128 lots subject to D3 paying to the plaintiff the difference between the present value of the 128 lots and the value of the 128 lots as at 29 October 2008, that is the date the AA was executed. Upon full settlement of this positive difference in value, the plaintiff shall cause the private caveats lodged on the 128 lots to be removed as per the prayers in paras 7(a) to (i) of the D3's counterclaim.

THE APPEAL

[20] Dissatisfied with part of the learned HCJ decision, D3 filed notice of appeal dated 16 October 2019 confined only on the issue of unjust enrichment. Later, D3 filed a notice of motion to this court to amend the notice of appeal. The plaintiff did not object to D3's application. Through a consent order dated 17 August 2020, the notice of appeal was amended to add D3's appeal against the decision the learned HCJ in dismissing its counterclaim.

[21] It should also be noted that there is no appeal or cross appeal filed by the plaintiff against any part of the decision of the learned HCJ. Therefore, we find that the plaintiff is bound by the entire findings of the learned HCJ.

OUR DECISION

[22] The appeal filed by the appellant is very specific. The amended notice of appeal specifically stated that:

> ... merayu kepada Mahkamah Rayuan terhadap sebahagian keputusan Yang Arif tersebut yang memutuskan bahawa perayu telah mendapat keuntungan tidak berpatutan (unjust enrichment) dan seterusnya memutuskan bahawa keuntungan tidak berpatutan (unjust enrichment) yang dinikmati oleh perayu adalah penambahan nilai tanah-tanah yang terlibat antara tempoh 15.4.2019 dan 29.10.2008 dan keputusan Yang Arif tersebut yang tidak membenarkan tuntutan balas Perayu.

Therefore, the focus of this appeal will revolve only on two issues, that are whether there is any unjust enrichment received by D3 at the expense of the plaintiff out of the said project and whether D3's counterclaim for the removal of the private caveats filed by the plaintiff over the 128 lots together with an order for assessment of damages in respect of the same to be allowed.

A UNJUST ENRICHMENT

The law

B **[23]** Unjust enrichment is a restitutionary remedy which also known as the law of restitution. Unjust enrichment is not a claim for compensation by the plaintiff in pursuance to his loss but instead a claim of the benefit wrongfully gained by a defendant. The law allows the plaintiff to claim for restoration of benefits against the defendant and the benefits obtained by the defendant must be at the expense of the plaintiff. The concept of unjust enrichment has been C recognised by the Federal Court in the decision of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 (*Dream Property*'s case).

D **[24]** To appreciate the concept of unjust enrichment decided in *Dream Property*'s case, it is beneficial to narrate briefly the facts of the case. Dream Property Sdn Bhd ('the defendant') entered into a sale and purchase agreement ('SPA') to buy Atlas Housing Sdn Bhd's ('the plaintiff') land known as grant No 101840 Lot 325 Mukim Simpang Kanan in Batu Pahat at the sum of E RM33.5m and to build a commercial complex. Upon execution and payment of the 10% of the purchase price, the SPA permitted the defendant to occupy and to commence construction works to build a mall. A dispute arose as to the issue of the date of the vacant possession of the land which will determine the date of full payment of the balance 90% of the purchase price. The defendant F failed to pay the balance purchase price within the time frame but the construction of the mall went on unhindered and proceeded notwithstanding the court action and proceedings. By the time the trial before the High Court was concluded, a fully functioning completed commercial complex with ongoing businesses and tenants stood on the land, which was known as Batu G Pahat Mall. The mall became a thriving business centre. The plaintiff sued the defendant for vacant possession and the defendant counterclaimed to be restituted for the prevailing market price of the mall arguing that the plaintiff would be unjustly enriched at the defendant's expense.

H **[25]** The case went up to the Federal Court and the first two question posted revolve the questions of unjust enrichment. The two question are as follows:

> Question 1: Whether as a matter of law if the defendant was in breach of contract for the purchase of the land dated 19 November 2004, whether it precludes the defendant from being awarded restitution pursuant to the doctrine of unjust I enrichment in respect of the defendant's improvement and enhancement of the land, namely by obtaining planning permission, building plan approval and constructing at the defendant's own cost, effort and experience, upon the land and a shopping mall which subsequently was tenanted with an ongoing business, goodwill and brand name thereupon without the plaintiff (compensating the

defendant for having improved the ultimate market value of the land and is the defendant's remedy merely confined to compensating the defendant merely for the cost of construction of the said shopping mall? A

Question 2: What is the measure of restitution for unjust enrichment, in particular, is the measure of restitution calculated merely restricted to the cost of construction of a building, without reference to the enhancement of the market value of the said land? B

[26] In discussing the law of unjust enrichment, The Federal Court made following observation and concluded that: C

[107] We pause here for a moment to underline the significance of the law of unjust enrichment in relation to all the rights of the parties to a contract which has been validly terminated. The critical issue that needs to be addressed is what constitutes unjust enrichment and undue benefit, and in what manner should a purchaser of vacant land be granted restitutionary relief when he has constructed a building on the said piece of land pursuant to and expressly permitted by a contract between him and the vendor. In our view, the following issues are important to determine the outcome of this appeal. Is it fair and equitable for the purchaser upon the termination of contract to be awarded only the cost of construction of the building, in this case the mall, or the market value of the mall? D

[108] This is a good place to point out that remedies for contractual disputes are generally compensatory in nature, with damages assessed based on the loss suffered by the claimant. Restitutionary remedies, on the other hand, focus on any unjust enrichment to a party at the claimant's expense. It is aimed at restoring that enrichment to the claimant. It is clear on principle and on authority that the idea of justice behind this aim is that no one should be made richer through loss to another. E F

[109] In Goff & Jones: *The Law of Unjust Enrichment*, para 1–08, it is stated:

> Whatever may be the underlying moral justifications for the award of restitution all these cases, the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases, it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled). G H I

[110] Restitution simply means that a party who has received a benefit must restore the benefit received by him. The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of

contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand, restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment (see: Goff & Jones on *The Law of Unjust Enrichment* para 1-04). The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.

[111] As stated by Lord Wright in *Fibrosa Spolka Akcyjna Appellants; and Fairbairn Lawson Combe Barbour, Limited Respondents* [1943] AC 32 at p 61:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derive from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

[112] Since then English law has recognised an independent law of unjust enrichment by recognising a claim for restitution based on unjust enrichment. According to Goff & Jones: *The Law of Unjust Enrichment* (see para 105), the highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance and accordingly calls for discrete stand-alone treatment. This was shown in a number of cases which were cited by learned counsel for the defendant, namely *Banque Financiere De La Cité Appellants and Parc (Battersea) Ltd and Others Respondents* [1999] 1 AC 221, *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin), *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; [2004] 1 WLR 2775, *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; [2009] 1 WLR 1580, *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another* [2008] 1 AC 561 and *Investment Trust Companies (in liquidation) v Commissioners for Her Majesty's Revenue and Customs* [2012] EWHC 458 (Ch).

...

[118] Nearer home, there is now no longer any question that unjust enrichment iaw is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229; [1999] 5 CLJ 31 and in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59; [2012] 4 CLJ 589. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled *'An Introduction to the Law of Unjust Enrichment'* [2013] 5 MLJ 1 by Alvin WL See), *in our view, the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice*. (Emphasis added.)

[27] In consequence, the Federal Court answers to the relief questions are as follows:

> Answer to question 1: The defendant is not precluded from being awarded restitution pursuant to the law of unjust enrichment in respect of the defendant's improvement and enhancement of the land at the defendant's own costs, effort and experience.
>
> Answer to question 2: The measure of for unjust enrichment is the market value of the mall and it is not restricted to the costs of construction of the building.

The undisputed facts

[28] Coming back to this appeal before us, it is undisputed fact that the plaintiff had appointed D3 as its property manager and stepped in as a 'white knight' to revive the said project which had been abandoned for about 12 years. For that purpose, they voluntarily entered into the PMA dated 12 July 2007 and later, the AA dated 29 October 2008.

[29] Under the PMA, D3 has to pay the consideration of the sum of RM1,000 to the plaintiff to be appointed as the project manager to rescue and to manage the said project in whatever ways or manners deemed fit and proper by D3. Via a power of attorney dated on the same day as the PMA, D3 was given full authority to act on behalf of the plaintiff to carry out the planning, management, completion of the housing units and infrastructure of the said project. At its own cost, D3 was required to complete the abandoned housing units which had been sold and was also authorised to build and sell the unsold housing units and entitled to all monies from the sales of such unsold units in the said project. D3 had 18 months from date of commencement which was not later than three months from the date of the agreement to complete the said project and entitle to an extension of time as set out in the PMA. The plaintiff as the landowner was responsible to take all necessary steps for the discharge of the third party charge on the said land and in this regard settle any debts without delay.

[30] The said project suffered a hiccup. D3 was not able to commence the construction works as the said land was encumbered with undischarged bridging loan taken by D4 from two banks represented by Aseambankers. Upon negotiations, the financiers agreed to reduce the redemption sum from RM18m to RM800,000. The plaintiff could not raise enough fund to redeem the said land. After negotiation, the plaintiff and D3 agreed to enter into the AA. Inter alia, D3 agreed to bear and pay the redemption sum on behalf of the plaintiff to discharge the charge over the said land so that the abandoned project can be revived and to pay additional consideration of RM500,000 to the plaintiff. As a consideration and security to D3 in making such payments, the plaintiff agreed to transfer the development lots of the 126 units of

shophouses, one lot of the business complex and 1 lot of the medium cost apartments in the said project to D3 (the 128 lots). Pursuant to the AA, the plaintiff agreed to extend the completion date of the said project to 1 June 2011. It was also agreed that further extension of time ('EOT') from time to time should be given if D3 face with difficulties from bringing financiers, end-financiers, purchasers, government departments, difficulties in contacting or getting co-operation from purchasers or other problems which are not foreseeable by D3 to which such problems will delay the revival of the said project.

[31] Based on the AA, the plaintiff transferred the 128 lots to D3. The construction works on the said project started. D3 took time to revive the said project and after numerous EOT granted by the plaintiff, finally D3 completed phase 5 of the said project when the certificate of practical compliance ('CPC') was issued on 16 March 2015 and the certificate of occupancy ('CFO') was issued by the local authority on 9 May 2016.

The learned HCJ's decision on unjust enrichment

[32] Based on the undisputed facts, the learned HCJ made the following finding:

> [31] Upon my meticulous reading of both recital G and clause 2.4 of the additional agreement read together with the Agreement, it is plainly expressed that the Lots were transferred as consideration. It is also expressed as for security not for the plaintiff, but for the third defendant in consideration of redeeming the loan then owing by Multi Track Properties to Aseambankers (the bridging financier) as well as to pay the plaintiff the consideration sum of RM500,000. In other words, I find and hold that the lots were not transferred as security to the third defendant to ensure that the third defendant completed the project in its entirety as envisaged in the agreement, contrary to that as asserted by the plaintiff. Hence, in principle, I find and hold that the private lodged by the plaintiff on the lots must be removed, as it would otherwise wrongly encumber the dealing of the lots by the third defendant as the lawful registered proprietor. Since it was not expressly provided in the additional agreement, I further find and hold on an objective construction of the additional agreement that the arrears in quit rent in respect of the transferred lots have to be borne by the third defendant as the new registered proprietor.

[33] Of course, D3 agrees with the said finding of the learned HCJ. However, the plaintiff did not launch any challenged against the said decision. What is the effect of the said finding? It clearly shows that the said 128 lots were properly or legally transferred from the plaintiff to D3 according to the terms and conditions of the PMA and the AA. In other words, the said 128 lots legally belong to D3 consequence to the terms and the conditions of the contracts entered.

[34] Ironically, despite having found and held that the 128 lots were transferred to D3 as consideration, the learned HCJ further considered and held that it could be unjust if the consideration does not commensurate under such circumstances as envisaged in the contracts. At para [36] of the grounds of judgment ('GOJ'), the learned HCJ made the following findings:

> That notwithstanding, the claim for compensation for breach contract is not synonymous with restitution. They both stand on their independent footing. *The plaintiff here has also framed its case in restitution for unjust enrichment on the part of the third defendant premised on the return of all the lots because it was transferred only as security*. It was unconscionable according to the plaintiff. I have, however, found and held that the transfer of the lots was not as security but consideration based on the agreement and additional agreement read together. *Nevertheless, it could be unjust enrichment if the consideration does not commensurate with the circumstances as envisaged by the parties in the contract as they eventually pan out*. (Emphasis added.)

[35] Based on the above findings, the learned HCJ referred to law of unjust enrichment decided by the Federal Court in *Dream Property*'s case. Then, His Lordship had opined and concluded that:

> [41] Unjust enrichment is thus in my opinion a flexible doctrine of justice design to ensure that no one unconscionably benefits from a commercial transection that has gone awry. However, it is undoubtedly fact sensitive dependant on the prevailing circumstances of each case. Besides *Dream Property Sdn Bhd ,* this doctrine has been previously applied in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229 and in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59; [2012] 4 CLJ 589 as and when it was reasonable and proper.
>
> [42] On the facts herein, the third defendant claimed that it had incurred about RM18,225,571.16 to execute the reduced scope of the agreement and additional agreement. I am mindful, however, that this has been challenged by the plaintiff as being excessive and involving expenditures unconnected with the project. On the other side of the equation, the third defendant in undertaking the project, had also benefitted from the purchase price payment of units in the project, payable either by the purchasers or their end financiers, besides also the value of the transferred kots. The total amount received or derivable by the third defendant from the purchasers amounted to RM8,898,806.08. The present value of the lots is RM16.42m. They add up to RM25,318,806.08. Mathematically as it stands, the third defendant hence stood to gain a profit of about 28% without completing its originally undertaken obligation under the agreement and additional agreement, in both scope and time, as alleged by the plaintiff. The third defendant had also not paid the balance of RM435,000 to the plaintiff as envisaged in the additional agreement. Furthermore, the value of the undeveloped lots had probably appreciated during the prolonged period of completion of the renamed phases 1 to 5 of the project. There is no specific express provision in the agreement or additional agreement that the third defendant has the discretion not to develop the development in Item D of the Final Schedule to the agreement as it deemed fit.

A [43] In the circumstances, I find and hold that the third defendant had unjustly benefited at the expense of the plaintiff by simply retaining the transferred lots undeveloped. Having done so, the third defendant has profited at least in the sum of RM7,093,234.90 without having to assume the contractual risk of developing the project in entirety based on the scope as originally envisaged in the agreement and additional agreement read together. Moreover, third defendant likely gained from the sheer appreciation in value of the lots over the period of time of the prolonged completion of the other completed parts of the project. These lots may instead be now put for sale as empty land by the third defendant without any commercial risks at the plaintiff experience. The plaintiff has lost out by not getting what was bargained with the third defendant.

[44] It is plain that the purpose of the plaintiff in entering into this transaction is that the third defendant would develop the project in its entirety, as originally laid out in the agreement and supplemented by the additional agreement. However, it is clear that the plaintiffs purpose has not been achieved since the project has not been completed in its entirety. As such, the enrichment on the part of the third defendant's retention of the lots is without basis and unjust unless appropriately restituted. There was only part performance of the agreement and additional agreement by the third defendant.

[45] Consequently, and notwithstanding the lots had been lawfully transferred to the third defendant as consideration, i find and hold that the third defendant may retain the lots subject to the third defendant paying the plaintiff the difference between the present value of the lots and the value of the lots as at 29 October 2008, the date the additional agreement was executed.

[36] First and foremost, we have to consider the findings mention in para [36] of the learned HCJ's GOJ. From the reading of the said paragraph, the learned HCJ had observed that the plaintiff had framed its case on restitution for unjust enrichment when claiming the return of the 128 lots. Even though the learned HCJ had found and held that the 128 lots was properly transferred in accordance with the terms and conditions of the PMA and the AA read together, His Lordship further held that it could be unjust if the consideration does not commensurate with the circumstances as envisaged by the parties in the said concluded contracts. Based on the said findings, it seems that the learned HCJ had considered on two matters, that are: (a) restitution for unjust enrichment was properly pleaded by the plaintiff, and (b) it is an unjust enrichment if the consideration paid to the plaintiff under the PMA and the AA does not commensurate the benefit obtained by D3.

[37] On the first matter, the Federal Court in the *Dream Property*'s case have found that it is necessary to make available the right to restitution of remedy as a response to unjust enrichment, independent of the law of contract and torts. In other words, claim for restitution based on unjust enrichment is a cause of action by itself. Therefore, the cause of action must be established in the statement of claim within a proper and specific plea. Material particulars that

give effect to the alleged unjust enrichment must be provided in the pleadings. A

[38] The law on pleadings is well settled. Generally, parties are bound by their pleadings and the court should not decide on the issue that was not pleaded. Federal Court in the case of *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 had made the following observation and had opined that: B

There is considerable authority in regard to the purpose and effect of particulars filed pursuant to O 19 r 7A of the Rules of the Supreme Court at p 31 of *Halsbury* (3rd Ed, Vol 3), the learned commentator has this to say: C

> A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered.

In *Thomson v Birkley* (1883) 47 LTR p 700 Watkin Williams J says: D

> The object of particulars is to prevent surprise, and to limit and particularise events in order that both parties should come to trial fully prepared for the issues.

In *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 413 Cotton LJ says:

> The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise. E

In *Thorp v Holdsworth* (1876) Ch 637 at 639 Jessel Mr says:

> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of R XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. F G

Finally, in *Yorkshire Provident Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 114 at 152 Lindley LJ says:

> What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars — of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars. H I

Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut ...

On the same principle of law related to the rule of pleadings, this court in the case of *Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 has made the following observation:

> [23] In such a situation, a return to the basic governing principles and rules of pleadings in our system of civil litigation will be timely and appropriate. This was also the route adopted by the learned judicial commissioner, but, with the utmost respect, his conclusions resulted from a misapplication of these basic principles. The law reports are replete with exhortations and reminders by judges on the need for decisions to be grounded on the pleaded case of the litigants, whether plaintiff or defendant. The need to comply with the rules on pleading are generally to be strictly enforced to avoid surprises at the trial and to narrow and define the issues of the parties so that each will know the opposing party's case, to prepare to meet it in advance and to marshal the necessary evidence at trial to establish its claim and answer the defence of the opposing party. The underlying rationale is not only to prevent surprises as seemed to be the reasoning of the High Court, but is much more than just that.
>
> [24] That classic, authoritative text on the rules of pleadings — Sir Jack Jacob & Ian S Goidrein, *Pleadings: Principles and Practice* — provides four 'objects' Pleadings — their dual object in summary. Pleadings serve a two-fold purpose:
>
> (a) first to inform each party what is the case of the opposite party which he will have to meet before and at the trial; and
>
> (b) secondly concurrently to appraise the court what are the issues. The identity of the issues is crucial, not only for the purposes of trial, but aiso for the purposes of all the pre-trial interlocutory proceedings.
>
> The object of pleadings — in detail
>
> (a) first to define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court ...
>
> (b) secondly to require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial ...
>
> (c) thirdly to inform the court what are the precise matters in issue between the parties which alone the Court may determine, since they set the limits of the action which may not be extended without due amendment properly made ... in *Blay v Pollard and Morn's* Scrutton LJ said:
>
> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitiled to take such a course ...
>
> (d) fourthly to provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided thereon so as

> to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them ... (at pp 3–4 of the text (1990 Ed).

[25] As evident from the passage above, not only are the immediate litigants bound by the rules of pleadings, so is the court.The court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the court to enter into any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation ... (*Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218).

[26] A decision based on an unpleaded case will as a rule occasion a failure of natural justice and will be liable to be set aside on appeal. It denies the litigant, the right to present his case fully before the judge on the unpleaded issue before the decision is made by the court. A corollary to this principle is the following: it is not the duty of the court to make a case for a party when that party does not raise, or wish to raise, a point in the litigation. *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, states the position very clearly thus:

> A judgment should be based upon the issues which arise in this suit. If such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure.

[39] Specifically, the party pursuing relief on unjust enrichment must provide the material particulars that can shows the elements of unjust enrichment in the pleadings. Federal Court in the case of *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 MLJ 141 refuse to answer the question framed by TNB on unjust enrichment because it was never pleaded. The strict approach by the Federal Court can be seen in the judgment as follows:

[96] Coming back to the present appeals, as an alternative or in addition to the statutory cause of action under s 38(3) of the Act for recovery for loss of revenue, TNB is similarly entitled to legally pursue the claim based on a cause of action in unjust enrichment. *If TNB elects to pursue relief for unjust enrichment then, as is a matter of settled law, there must be a proper and specific plea in the statement of claim that its cause of action is so founded. Further, material particulars that give rise to unjust enrichment must be provided in the pleadings*. In this regard, it is a well-settled legal principle that the court should not decide on an issue that was not pleaded by the parties. Parties are required to set out the factual bases of their respective cases in the pleadings. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court (see *Salman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492). Pleadings enable both parties to know in advance the averments being

A made against them so that they will not be taken by surprise during the trial. *Tellingly, in the present appeals TNB did not plead that its cause of action was founded on the law of unjust enrichment. Unjust benefit was not a pleaded issue*. With respect, the submission on the benefit/unjust enrichment question by learned counsel for TNB is, therefore, misconceived. (Emphasis added.)

B

[40] Guided by the said settled principle of law, we perused the plaintiff's pleadings, which include the plaintiff's statement of claim and the plaintiff's reply to D3's statement of defence and plaintiff's defence to D3's counterclaim. Upon reading the plaintiffs pleadings as a whole, we found that the basis of the C plaintiff's claim against D3 was for the return of the 128 lots which had been transferred to D3. The plaintiff at all material time referred the 128 lots as security lots held by D3 on behalf of the plaintiffs to secure the performance of the contracts. Nowhere, especially in the statement of claim did the plaintiff plead restitution for unjust enrichment or at least lay down material facts or D material particulars that give rise to unjust enrichment. Besides that, the plaintiff also did not plead that its cause of action was founded on the law of unjust enrichment. Therefore, it is crystal clear that the issue of unjust enrichment or unjust benefit was never pleaded by the plaintiff.

E

[41] To round off on the pleadings point, we are off the opinion that the learned HCJ's had erred in his finding when he found out that the plaintiff had framed its case on restitution for unjust enrichment based on plaintiff's pleadings.

F

[42] Then, on the second matter, the learned HCJ had considered and held that it is an unjust enrichment if the consideration paid to the plaintiff under the PMA and the AA does not commensurate the benefit obtained by D3. On this issue, the law on the adequacy of consideration in a contract is well settle. G Explanation 2 of s 26 of the Contracts Act 1950 clearly stated that:

> An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given.

H

The adequacy of consideration further illustrated under Illustrations (f) of the same section as follows:

> A agrees to sell a horse worth RM1,000 for RM10. A's consent to the agreement was I freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

[43] Blackburn J in the case of *Bolton v Madden* (1873) LR 9 QB 55 had held that:

> The general rule is, that an executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is 'either for the benefit of the defendant or to the trouble or prejudice of the plaintiff'. If it be either, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced.

House of Lords in the case of *Chappell & Co Ltd v Nestle Co Ltd* [1959] UKHL 1 confirmed the traditional doctrine that consideration must be sufficient but need not be adequate and consideration also need not have economic value. Lord Somervell of Harrow in his finding had made a simple analogy as follows:

> A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promise does not like pepper and will throw away the corn.

In the textbook of *Cheshire, Fifoot and Furmston's Law of Contract* (12th Ed) at p 81, in relation to adequacy of consideration states that:

> It has been settled for well over three hundred years that the courts will not inquire into the adequacy of consideration. By this is meant that they will not seek to measure the comparative value of the defendant's promise and of the act or promise given by the plaintiff in exchange for it, nor will they denounce an agreement merely because it seems to be unfair. The promise must, indeed, have been procured by the offer of some return capable of expression in terms of value ...

[44] Back home, this court in the case of *Tan Tay Vui v MC Global Sdn Bhd* [2020] MLJU 712; [2020] 1 LNS 21 had decided that the adequacy of consideration is never a basis to invalidate any contract. Thus, if we go back to basic, a legally binding contract is formed when there is an offer, acceptance of that offer, consideration and an intention to be legally bound by the terms agreed by the contracting parties. As for consideration, it must be sufficient but need not be adequate. The contractual promise will only be enforced if the person benefiting from it has provided something in return. The courts are not concerned with the adequacy of consideration provided, but it must have some sufficient value. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. See *Currie v Misa* [1875] LR 10 Ex 153.

[45] Guided by the trite principle of law on adequacy of a consideration in a contract, it will be wholly unjustifiable for the learned HCJ to decide that a claim for unjust enrichment can be based on inadequate consideration received by the plaintiff compared to the benefits obtained by D3 under the PMA and the AA. Clearly, the learned HCJ had erred in his finding on this matter.

Was D3 enriched on other reasons?

[46] At paras [43]–[44] of the GOJ, the learned HCJ had found and held that D3 is unjustly benefited at the expense of the plaintiff by simply retaining the 128 lots undeveloped and D3 is likely gained from the sheer appreciation in value of the 128 lots over the period of time of the prolonged completion of the other completed parts of the said project. As to the purpose of the contracts, the plaintiff had expected that D3 would develop the said project in its entirety as originally laid out in the PMA and the AA. However, the plaintiff can't achieve its purpose since D3 failed to complete the said project in its entirety. Therefore, it is unjust on the part of the D3's to retain the 128 lots unless appropriately restituted.

[47] Before going into the issue of unjust enrichment, let be reminded that the learned HCJ in his decision had found out that the 128 lots were transferred to D3 as a consideration and not as a security under the PMA and the AA. There is no appeal failed by the plaintiff against the said finding. If means that the 128 lots were legally transferred according to the contracts entered by the plaintiff and D3.

[48] Federal Court in *Dream Property*'s case had adopted 'the absence of basis' approach and held that the plaintiff can escape restitutionary liability by showing that there was a legal ground for receiving such enormously benefits. In *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60; [2021] 2 CLJ 441 the Federal Court rejected a plea for unjust enrichment on the basis that liquidated ascertain damages is statutorily provided pursuant to the sale and purchase agreement. Whereas, Lord Sumption in the Privy Council decision in *Fairfield Sentry Ltd (in Liquidation) v Migani and others and other cases* [2014] UKPC 9 had made following observation:

> 18 The basic principle is not in dispute. The payee of money 'cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him': *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 408B (Lord Hope) or, as *Professor Burrows has put it in his Restatement of the English Law of Unjust Enrichment (2012) at §3(6), 'in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation*'.Therefore, to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered, unless (which is not suggested) the mistake is such as to avoid the contract: *Barclays Bank Ltd v WJ Simms Son & Cooke (southern) Ltd and Another* [1980] QB 677, 695. So far as the payment exceeds the debt properly due, then the payer is in principle entitled to recover the excess. (Emphasis added.)

[49] Based on those authorities and the decision of the learned HCJ that the 128 lots were transferred to D3 as a consideration under the PMA and the AA read together, obviously D3 is contractually entitled to own the 128 lots. With that, D3 is also entitle to develop or to sell the 128 lots and retain or to keep whatever proceeds therefrom. In other words, D3 had received the 128 lots under a valid contractual transaction and therefore, no element of unjust enrichment can arise from that transaction.

[50] As to the issue of the prolonged completion of the said projects, it is undisputed fact that D3 had completed the construction of phase 1 to phase 5 of the said project. Even though D3 could not follow the time frame stipulated in the PMA and the AA, it is undisputed that the plaintiff had agreed to grant various EOT to D3. With that, the plaintiff is not entitled to complain about D3's delay in completion of the said Project. Furthermore, the plaintiff did not claim for breach of contract on the basis that D3 did not complete the construction of the 128 lots or delayed the construction of the said project within the time frame.

[51] Next, the learned HCJ also found and held that D3 failed to develop the said project in entirety which is against the purpose of the contracts and the expectation of the plaintiff. On this issue, we have to look at the entire evidence including the contemporaneous document involve. The law on documented evidence is clear. Where documents formed part of the same transaction, they should be read together. See: this court decision in the case of *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413 and High Court decision in the case of *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165.

[52] No doubt that the most relevant document to look at should be the PMA and the AA. Looking at both contract document in entirety, D3 is responsible to complete the development of the said project and the said project refer to the whole project known as 'Taman Pekatra Indah'. It is undisputed fact that as the said project progress, D3 had faced a few obstacles and problems to construct and to complete the said project which needed plaintiff's assistance in term of granting EOT. This can be seen from the series of correspondences exchange between D3 and the plaintiff.

[53] Related to the issue on the responsibility of D3 to complete the said project in entirety, there are three most relevant correspondences to look at. First, a letter dated 23 April 2021 from plaintiff's former solicitors, Zulhaimi & Co to D3. For easy reference, those letters are as follows:

A Tetuan Simcity-Ete Venture Sdn Bhd

No. 83 Jalan Pekatra Indah

Taman Pekatra Indah, 14120 Simpang Ampat

B SEBERANG PERAI SELATAN

Tuan,

Perjanjian Pengurusan Projek Tambahan bertarikh 29.10.2008

C Dengan segala hormatnya kami merujuk kepada perkara di atas dan kami mewakili 'Koperasi Pembangunan Kampung Tradisional Tasek Berhad (selepas ini dirujuk sebagai "klien kami')

2. Menurut *mesyuarat bertarikh 26.3.2012*, pihak Koperasi dan pihak Syarikat teiah bersetuju seperti berikut:-

D 2.1 *Koperasi bersetuju melanjutkan tempoh kontrak* dengan syarikat selama 24 bulan mulai 1.4.2012 hingga 1.4.2014 bagi fasa 1, 2, 3, 4 dan 5 tanpa apa-apa gangguan atau halangan daripada koperasi dalam apa cara sekalipun bagi membina dan menyiapkan fasa 1, 2, 3, 4 dan 5.

E 2.2 *Syarikat bersetuju memulangkan kesemua hakmilik unit-unit banglo dan unit kos rendah* yang terikat dengan fasa yang tersebut di atas dan seperti senarai dilampirkan dalam masa 14 hari dari tarikh surat ini kepada Koperasi dan Koperasi bebas memajukan dan berurusniaga dengan unit-unit tersebut tanpa apa-apa halangan atau gangguan dalam apa cara sekalipun daripada Syarikat.

F 3. Kandungan lanjutan surat ini adalah sebagai tambahan kepada perjanjian yang telah dimasukki oleh Koperasi dengan Syarikat sebelum ini dan semua terma dan syarat perjanjian-perjanjian tersebut adalah dikekalkan.

Sekian, terima kasih,

Yang benar,

G Zulhaimi & Co

Then, D3 agree to the plaintiff's proposal subject to certain conditions. Through its solicitors at that material time, Low Meng Chua & Co, D3 sent a letter dated 9 May 2012 setting the following conditions:

H Tetuan Zulhaimi & Co,

Peguambela & Peguamcara

The Oval Chamber,

I Masyhur House, No. 71,

Jalan Mengkuang, 12200,

Butterworth, Pulau Pinang.

Tuan

Perjanjian Pengurusan Projek Tambahan bertarikh 29.10.2008

Kami merujuk kepada perkara tersebut di atas dengan merujuk kepada surat tuan bertarikh 23.4.2012.2.

2. Kami diarahkan oleh anakguaman kami untuk menyatakan bahawa anakguaman kami bersetuju dengan cadangan anakguaman kamu untuk melanjutkan kontrak antara kedua-dua pihak selama 24 bulan mulai 1.4.2012 hingga 1.4.2014 bagi fasa 1, 2, 3, 4 dan 5 tanpa apa-apa ganguan atau bilangan daripada anakguaman kamu dalam apa-apa cara sekalipun bagi membina dan menyiapkan fasa 1, 2, 3, 4 dan 5.

3. Anakguaman kami juga bersetuju dengan cadangan supaya memulangkan kesemua hak-hak unit banglo (berjumlah 321 unit seperti ternyata dalam senarai Lampiran 1 surat tuan bertarikh 23.4.2012).

4. Anakguaman kami juga bersetuju untuk memulangkan 336 unit-unit kos rendah (seperti ternyata dalam Jadual Pertama Perjanjian bertarikh 12.7.2007).

5. *Kami juga diarahkan oleh anakguam kami untuk menyatakan bahawa dengan penverahan unit-unit banglo dan kos rendah (para 3 dan 4 diatas) maka anakguaman kami tidak akan terikat dengan kewaiipan seperti ternyata dalam perenggan 2, 5 fa), fb), (c) Perjanjian bertarikh 12.7.2007*.

6. Anakguaman kami tidak bertanggungjawab atas kesemua unit-unit banglo mahupun unit-unit kos rendah selepas penyerahan kepada pihak Koperasi.

7. Seperti ternyata dalam surat kami bertarikh 6.4.2012 kami diarahkan untuk mengulangi kehendak anakguaman kami bahawa 21 unit yang belum dijual dan juga 128 unit yang diserahkan kepada anakguaman kami, dikekalkan mengikut perjanjian-perjanjian antara kedua-dua anakguaman sebelum ini.

8. Anakguaman juga pohon supaya *kandungan surat ini dikekalkan sebagai tambahan kepada perjanjian yang dimasukkan oleh Koperasi dan juga dengan anakguaman kami sebelum ini dan juga termasuk semua terma dan syarat perjanjian-perjanjian dikekalkan melainkan yang tidak dipersetujui seperti ternyata dalam perenggan 3 dan 4 diatas.*

Sekian, terima kasih,

Yang benar,

Low Meng Chua & Co

As a response, Zulhaimi & Co on behalf of the plaintiff agreed with D3's conditions through a letter dated 21.6.2012 as follows:

Tetuan Low Meng Chua & Co

Peguambela dan Peguamcara

11-5 Unit 6, New Bob Centre

11, Jalan Gitlieb

10350 PULAU PINANG

Tuan

Perjanjian Pengurusan Projek Tambahan bertarikh 29.10.2008

Dengan segala hormatnya kami merujuk kepada surat tuan bertarikh 9.5.2012 mengenai perkara di atas dan kami mewakili "Koperasi Pembangunan Kampung Tradisional Tasek Berhad (selepas ini dirujuk sebagai "klien kami").

2. Dimaklumkan bahawa *anak quam kami bersetuju dengan isi kandungan surat tuan bertarikh 9.5.2012 vang dikemukakan melalui kami*.

3. Oleh yang demikian, sila tuan uruskan supaya klien tuan memulangkan semua hakmilik bagi 321 unit banglo yang berkenaan kepada pejabat kami dengan kadar yang segera. (Rujuk para 3 surat tuan bertarikh 9.5.2012).

Sekian, terima kasih,

Yang benar,

Zulhaimi & Co

(Emphasis added.)

[54] From the said correspondences, it is clear that the plaintiff is asking for the returned of the 321 bungalow lots and 336 low-cost units from D3 as a consideration for the EOT. D3 agreed to the plaintiff's request subject to a few conditions which was later agreed by the plaintiff. The relevant condition was at para 5 of D3's letter dated 9 May 2012. D3 in agreeing to return the bungalow lots and the low-cost units to the plaintiff had demanded that it will no longer be bound by the obligation as set out in cl 2, 5 (a), (b), (c) of the PMA. Furthermore, D3 had requested that the contents of the said letter dated 9 May 2012 will be taken as addition to the contracts entered between the plaintiff and D3. Without hesitation, the plaintiff agrees to D3's request in toto.

[55] Obviously, the plaintiff's acceptance to D3's request through the letter dated 21 June 2012 had amended or modified the terms and conditions of the PMA. For easy reference, cl 2, 5 (a), (b), (c) of the PMA are as follows:

2. CONFERMENT OF FULL AUTHORITY TO THE PROJECT MANAGER

The Landowner hereby confers upon the Project Managers full authority to act on the Landowner's behalf and a Power of Attorney shall be granted by the Landowner to *Project Manager to carry out its planning, management, completion of the housing units and infrastructure for the said Project and the development of the said Land*. The Power of Attorney shall be revoked in the event the Project Manager fails to complete the said Project together within the stipulated completion period.

...

5. THE PROJECT MANAGER'S OBLIGATION

(a) *The Project Manager hereby covenants to construct and complete the*

buildings, driveways, drains, electricity and water supply and water and sewerage lines and all other related installation in a good and workmanlike manner and in accordance with approved plans and specifications.

(b) The Project Manager shall conform to all Provisions, Acts and any Regulation or By-Laws for the time being in force and affecting the housing units and will give all necessary notices to and obtain all requisite sanctions from the local authorities and or other authorities in respect of the construction of the said Project.

(c) The Project Manager undertakes to complete the abandoned housing units or buildings within eighteen (18) months from the date of work commenced on the project site whereby the time shall run subject to clause 4(b) above. The Project Manager shall be entitled to an automatic extension of time not exceeding twelve (12) months in the event the Project Manager is unable to complete the housing units due to any force majeure event as stated in Clause 8(a) or as a result of the failure of the Landowner to observe any of its obligations set forth in this Agreement or when there is any delay which is not within the control of the Project Manager to obtain any approval required by Majlis Perbandaran Seberang Perai or any other authorities, any letters, appeals and forms required by any statutory bodies or government departments related to the development of the said Project. (Emphasis added.)

With the modification to cl 2 and 5(a) of the PMA as agreed by the plaintiff, we find that D3 is no longer under obligation to complete the said project in entirety. Therefore, it is wrong for the learned HCJ to make a finding and hold that there is unjust on the part of the D3's to retain the 128 lots on the reason that D3 failed to complete the said project in entirety.

[56] Related to the same issue, the learned HCJ at para [32] of the GOJ held that the parties by their conduct had mutually terminated the PMA and the AA after prolonged non-completion of the said project in its entirety as required in the contracts. His Lordship further held that:

[33] The reduced scope of the project was not completed on 1 April 2014 but only around 2016. The certificate of fitness of the final portion of the renamed Phase 5 was only issued on 9 May 2016. Moreover, the third defendant only paid the plaintiff RM66,000 pursuant to clause 1 of the agreement and clause 2.2 of the additional agreement leaving the balance of RM435,000 unpaid thereunder.

[34] There is no documentary evidence that the parties have mutually terminated the agreement and the additional agreement in accord and satisfaction. There is, however, also no claim and cross claim for compensation in damages for breach of contract particularly for late completion of the project. The parties here, nevertheless, had, by their conduct, treated the agreement and the additional agreement as discharged by the time these suits were instituted. At this point, it is evident that the 70 units of buildings referred to in Item C phase 4 and the

development in Item D of the First Schedule to the agreement were not even carried out yet. Put simply, the agreement was not fully performed by the third defendant.

[35] Generally, in the absence of any specific agreed provision, the principle is that loss lies where it falls in mutually terminated part performed contract by conduct; see *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 at para [49]. In other words, save for claims made pursuant to accrued rights, neither party can claim against the other. Thus, the plaintiff's claim for RM435,000 allegedly based on breach of contract is unsustainable because it was not yet due thereunder as an accrued right in the absence of completion of the project in its entirety as provided in cl 2.2. read with cl 2.4 of the additional agreement.

[57] As mention before, the plaintiff had granted various EOT to D3 to complete the said project. Final date for D3 to complete the abandoned units in phase 1 to phase 5 according to the final EOT is on 30 June 2015. It is undisputed that D3 had completed its obligation in respect of all the phases within the time prescribed. CPC for phase 5 was issued on 16 March 2015, well within the dateline even though CFO for phase 5 was later issued by local authority on 9 May 2016. Based on our finding that D3 is no longer under obligation to complete the said project in entirety, D3 has in fact completed its obligation under the contracts.

[58] Therefore, we are off the view that the learned HCJ had erred in his finding that the contracts had been mutually terminated by conduct of the parties and the principle of loss lies where it falls apply. As D3 had performed his duties and obligations under the contracts, the plaintiff is entitled to the consideration of RM500,000 as set out in recital (F) of the AA. It is not disputed that D3 had paid a total sum of RM65,000 to the plaintiff to comply with the terms set out, leaving the balance of RM435,000 unpaid to the plaintiff. In fact, the learned counsel for D3 had acknowledged the balance amount as stated in para 55 of her written submission. Even though the learned counsel for D3 had submitted that the balance amount should deduct the quit rent paid by D3 on behalf of the plaintiff, the learned HCJ had decided that the quit rent should be borne by D3 as the new owner of the 128 lots. Therefore, the learned HCJ should have allowed the whole balance amount owed to the plaintiff as prayed in subpara 23(iii) statement of claim.

COUNTERCLAIM

[59] Next, we move to the second issue raised in D3's appeal, that is on the counterclaim. This second issue consist of two parts. First, the removal of the caveats lodged by the plaintiff on the 128 lots and secondly, the damages for wrongful entry of caveats to be paid by the plaintiff to D3.

[60] On the first part, even though the learned HCJ had decided that the 128 lots were legally transferred to D3 under the contracts and the private caveats lodged wrongfully encumbered the 128 lots, His Lordship instead of ordering the private caveats to be removed as prayed for by D3 its counterclaim had otherwise ordered that the caveats to remain pending D3 paying the judgment sum on unjust enrichment once it is ascertained.

[61] The law on caveatable interest is well settle. Federal Court in the case of *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475 had held that:

> [35] It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest.
>
> [36] Emphasis should be given to the words 'registrable interest' in s 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.

[62] It is clear that, after the 128 lots being legally transferred to D3, the plaintiff has no longer registrable interest on those lands. Even if the learned HCJ is correct in his decision on the issue on unjust enrichment, the plaintiff's right is only confine to the monetary interest or a right *in personam* against D3 and that right did not create any caveatable interest on the 128 lots. Therefore, those caveats entered by the plaintiff should be removed *in limine*.

[63] For the second part, D3 in the memorandum of appeal gave one liner ground of appeal as can be seen at para 20 as follows:

> 20. The learned Judge had erred in law and in fact in failing to allow the Appellant's counterclaim.

In the pleadings, D3 did not plead any facts as to the losses suffered due to caveats entered. In the statement of defence, the only relevant pleaded fact is at para 18 as follows:

> 18. Kaveat yang dimasukkan oleh Plaintif tersebut telah menyebabkan kebenaran merancang atas tanah tersebut tidak dapat diluluskan oleh Majlis Perbandaran Seberang Perai atas status kaveat tersebut.

In the counterclaim, D3 repeat and adopt the facts in the statement of defence without stating any further facts as to the losses suffered as a result of the wrongful entry of the caveats. As to the relief or remedy sought, D3 prayed at subpara 7(j) of the counterclaim as follows:

A j) bahawa ganti rugi dibayar oleh plaintif kepada D3 Simcity-ETE untuk kerugian yang dialami oleh D3 Simcity-ETE akibat kemasukan kaveat yang tidak sah ke atas 128 lot tersebut;

There is also no prayer in the counterclaim that D3 is seeking for the relief on B general damages and that damages to be assessed by the court.

[64] As to evidence, upon perusing the witness statement prepared by the two witnesses who gave evidence on behalf of D3, none of them was asked about the losses suffered by D3 in consequence to the entry of the plaintiff's C caveats on the 128 Lots. Neither any question was asked by the learned counsel for D3 about the losses when the two witnesses gave evidence in the examination-in-chief before the High Court. In other words, there is no single evidence presented by D3 to prove that it suffered losses due to the entry of the plaintiffs caveats.

D

[65] The law on counterclaim is trite. Order 15 r 2(2) of the Rules of Court 2012 provides that the defendant who claims in a counterclaim becomes the plaintiff and the plaintiff in the main action becomes the defendant in a E counterclaim. As a plaintiff in the counterclaim, D3 is bound by its pleadings and most importantly must properly prove its claim.Therefore, we find that D3 fail to prove any loss as a result of the wrongful entry of plaintiffs caveats on the 128 lots. Consequentially, we cannot accede to D3's application to have an order for the damages to be assess by the High Court as submitted in para 94 F of the counsel's written submission.

CONCLUSION

[66] Based on the reason adumbrated above, we unanimously find and held G that there are merits in the D3 appeal which warrant appellate intervention. We allow D3's appeal in part and also make a further order which ought to be given by the learned HCJ to the plaintiff based on the evidence tendered and more so agreed by D3.

H **[67]** As to the issue of unjust enrichment, we find that the matter was not properly pleaded by the plaintiff and since the learned HCJ had decided that the transfer of the 128 lots to D3 were for consideration under the PMA and the AA read together, there should be no element of unjust enrichment arise. We find that the learned HCJ had misdirected himself as to the law and the I facts, had failed to appreciate or to evaluate the evidence, had misunderstood the relevant evidence and had failed to consider relevant evidence in arriving at his decision on unjust enrichment issue. Therefore, we allowed D3's appeal on this issue and set aside the learned HCJ decision.

[68] As to the counterclaim, we allow D3's appeal in part. For the first part, we allow the D3's appeal and set aside the learned HCJ decision to retained all the caveats entered by the plaintiff pending D3's payment of the judgment sum on unjust enrichment. For the second part, we find that the losses due to the wrongful entry of caveats were not properly pleaded and the damages incur were not proved. We dismiss D3's appeal on the damages and there is no just cause for us to make any order for assessment of damages before the High Court.

[69] Next, based on the specific facts of the case, our finding at para [58] above and pleaded relief as prayed in subpara 23(iii) statement of claim, we are of the opinion that we should exercise our discretionary powers under sub-s 64(4) and (5) of the Courts of Judicature Act 1964 (the CJA 1964) and sub-r 7(4) and (5) of the Rules of the Court of Appeal 1994, PU(A) 524/1994. For easy reference, we produce the law and the rule which had a same provision as follows:

> (4) The Court of Appeal may draw inferences of fact, and *give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires*.
>
> (5) The powers aforesaid may be exercised not with standing that the notice of appeal relates only to part of the decision, and *the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision*. (Emphasis added.)

The fact is that, D3 had performed its obligation under the contracts. Therefore, the learned HCJ ought to have given an order to D3 to pay the balance consideration as stipulated under the contracts. It is not fair for D3 to keep the 128 Lots without paying the agreed consideration to the plaintiff. For the sake of justice, the consideration should be paid to the plaintiff even though the plaintiff failed to file any appeal or cross appeal against the learned HCJ's decision. By using the power under sub-s 64(5) of the CJA 1964, we order that D3 to pay RM435,000 unpaid consideration to the plaintiff together with the interest at the rate of 5%pa from the date D3 completed the development of phase 5, that is when CPC was issued on 16 March 2015.

[70] Finally, on cost of this appeal, we are of considered view that there should be no order as to cost based on the peculiar facts of the case. Each party had to bear their own cost.

Appeal allowed in part.

Reported by Nabilah Syahida Abdullah Salleh